No. _____

# In The
# Supreme Court of the United States

BRIAN SCHAFFER, a minor by his parents and next friends, JOCELYN AND MARTIN SCHAFFER, *et al.*,

*Petitioners,*

v.

JERRY WEAST, Superintendent of Montgomery County Public Schools, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, when parents of a disabled child and a local school district reach an impasse over the child's individualized education program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the hearing, which side has the burden of proof – the parents or the school district?

## LIST OF PARTIES

The petitioners are Jocelyn Schaffer and Martin Schaffer, appearing in their own right and as parents and next friends of their son, Brian Schaffer.

The respondents are Jerry Weast, Superintendent of the Montgomery County Public Schools, and the Board of Education of Montgomery County, Maryland.

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## PETITION FOR WRIT OF CERTIORARI

The petitioners – parents of a disabled child – respectfully petition the Court for a writ of certiorari to review the judgment of the court of appeals, which ruled that parents – rather than the school district – must bear the burden of proof at an administrative hearing, held under the Individuals with Disabilities Education Act, to assess the appropriateness of an individualized education program.

## OPINIONS BELOW

There are six opinions below, culminating in the court of appeals ruling that is the subject of this petition. In chronological order, they are as follows:

- In 1998, the administrative law judge ("ALJ") imposed the burden of proof on the parents and ruled for the school district on the merits of the child's individualized education program ("IEP"). This unpublished decision is reprinted in the Appendix at App. 120.

- In 2000, the district court reversed the ALJ on the burden of proof issue, placed the burden on the school district, and remanded the case for further proceedings. This decision is published as *Brian S. v. Vance*, 86 F. Supp. 2d 538 (D. Md. 2000). It is reprinted at App. 54.

- In 2000, with the burden of proof placed on the school district, the ALJ ruled for the parents on the merits, holding that the IEP proposed by the school district was inappropriate. This unpublished decision is reprinted at App. 70.

- In 2001, without deciding the burden of proof issue, the court of appeals vacated the district court's 2000 decision and remanded the case for further proceedings.

The opinion is found at *Schaffer v. Vance*, 2 Fed. Appx. 232 (4th Cir. 2001) (*per curiam*). It is reprinted at App. 50.

• In 2002, the district court again placed the burden of proof on the school district, and it affirmed the ALJ's 2000 ruling for the parents on the merits. This opinion is published as *Weast v. Schaffer*, 240 F. Supp. 2d 396 (D. Md. 2002). It is reprinted at App. 21.

• Finally, in 2004, a divided court of appeals reversed the district court on the burden of proof issue, imposed the burden on the parents and remanded the case. This decision – the subject of this petition – is published as *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004). It is reprinted at App. 1. The dissent of Judge Luttig is reprinted at App. 16.

An unpublished denial of rehearing *en banc* is reprinted at App. 164. An order of the district court – following remand – to stay proceedings in that court pending disposition of this petition is reprinted at App. 163.

## JURISDICTION

The panel decision of the court of appeals was entered on July 29, 2004. The decision of the court of appeals denying the petition for rehearing *en banc* was entered on August 24, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## STATUTORY PROVISIONS INVOLVED

This case arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. Reprinted in the Appendix is § 1400, which contains congressional findings as well as the purpose of the IDEA. App. 166. Also reprinted is § 1415, which contains procedural safeguards, including the § 1415(f) requirement for

an "impartial due process hearing." App. 174. The IDEA is silent on the burden of proof at such a hearing.

## STATEMENT OF THE CASE

Under the IDEA, Congress provides money to the States to "ensure that all children with disabilities have available to them a free appropriate public education ['FAPE'] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A). Those funds are then re-allocated to local school districts for use in defraying costs of their special education programs. Along with the federal funds comes an obligation for the school system to abide by certain procedural and substantive standards in developing individualized education programs ("IEPs") for children with disabilities.[1]

The procedural standards preclude school officials from making unilateral decisions about a child's IEP. Instead, such decisions must be made by school officials and parents in collaboration, with both parties having significant rights of appeal through administrative and judicial channels. If the parents and the school district reach an impasse over the contents of an IEP, either side may initiate an administrative proceeding – an "impartial due process hearing" – to bring the issue before a neutral

[1] The IEP is a written document developed by an IEP team that includes, *inter alia*, the child's parents, his teacher and local school division representatives. 20 U.S.C. § 1414(d). The IEP contains a statement of how the child's disability affects the child's involvement and progress in the general curriculum, a description of specific educational services to be provided to the child, annual goals, and objective criteria for evaluating progress. *Id.*

hearing officer or administrative law judge for resolution.[2] Any party aggrieved by the results of the administrative hearing may appeal to a state court of competent jurisdiction or to a federal district court.[3]

**The Petitioners' Child**

There is "no question" that Brian Schaffer has multiple disabilities. App. 56. He is "learning disabled, language-impaired and other health impaired." App. 24.[4] In addition, he has Attention Deficit Hyperactivity Disorder. App. 24.[5] From pre-kindergarten through the seventh grade, Brian attended an independent school, Green Acres School.[6] The tuition was paid by his parents, Jocelyn

[2] 34 C.F.R. § 300.507(a)(1) ("A parent or a public agency may initiate a hearing on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).").

[3] *See* 20 U.S.C. § 1415(i)(2)(A). States may elect to use an administrative review as an intermediate step between the due process hearing and judicial review. 34 C.F.R. § 361.57(g). However, Maryland has not implemented this option.

[4] The term "other health impairment" incorporates a broad array of disabilities. Defined by federal regulation, the term means:

> having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –
>
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and
>
> (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.7(c)(9).

[5] Now 20, Brian was only 14 when this case began. App. 75, 90.

[6] Like his older brother and sister, Brian eventually attended – and ultimately graduated from – the public schools of Montgomery County.

(Continued on following page)

Schaffer and Martin Schaffer. At Green Acres School, Brian had the benefit of small class size and significant accommodations, as well as extra services provided by his parents. Despite these services, he did not succeed. App. 24. In the fall of 1997, when Brian was in the seventh grade, Green Acres School concluded that he should attend a school that could more adequately accommodate his disabilities. App. 77. It was then that Brian's parents turned to the Montgomery County Public Schools ("the school district") and began to seek an appropriate placement for the following school year. App. 24.

The school district agreed that, under the IDEA, it was obligated to provide Brian with special education and related services. Even so, the school district rejected the conclusions of the outside experts who had evaluated Brian and the recommendations of the Green Acres teachers who had worked with him. Instead, the school district accepted the rosier and less informed views of its own employees, who had never taught the child.[7] Thus, there was disagreement about the nature of Brian's disabilities and, as a result, there also was disagreement about the services he required.

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However, given the initial failure of the school district to provide an adequate IEP, his public school attendance came several years after the events giving rise to this case, when the school district's reviewing team finally decided that Brian's parents and outside experts had been correct in their insistence that Brian needed small classes. *See* Record, Docket Entry 41 (Dec. of J. Schaeffer and Exhibits); Docket Entry 45 (Mot. for Sum. J. at 22 n.7).

[7] The ALJ later faulted the school district because "[its] experts made no effort to contact the Parents' experts and discuss [the] reports and recommendations [of the parents' experts]. Lack of contact by [the school district's] experts with the Parents' experts may have played a role in the failure by [the school district] to develop an IEP appropriate to the Child's educational needs and offer an appropriate placement." App. 114.

According to the outside experts, Brian suffered from a "unique central auditory processing deficit." App. 108. Thus, he needed "small, self-contained special education classes" that would "minimize the distractions interfering with his ability to learn." App. 25.[8] This finding was consistent with Brian's experience at Green Acres School, where he performed much more successfully in a class of 7 or 8 students than he did in his other classes, which did not exceed 15 to 16 students. *See* Record, Hearing of June 16, June 23, and July 2, 1998, before ALJ Stephen J. Nichols, Transcript 143, 530-31, 559, 574-77.

By contrast, the school district's employees did not believe that Brian had a central auditory processing problem.[9] In their view, he only had a "mild speech-language disability" and, thus, did not need the more intensive accommodations recommended by the outside experts. App. 26. As a result, the IEP proposed by the school district called for Brian to be taught most of his academic subjects in a large classroom with 24-28 other students. For some subjects, the school district simply planned to place Brian in a regular classroom. App. 90. For other subjects, his classroom would use an "inclusion model" with two teachers, one of whom would work with 5-6 special education students in the midst of the other students and larger setting. App. 87. The larger class size and "inclusion model" formed the centerpiece of the IEP offered by the school district. *See* App. 87-91.

In light of Brian's severe learning deficits and the advice of those experts most familiar with him, the parents advised the school district that its IEP was "insufficient to meet his identified needs." Rejecting the proposed

[8] A discussion of the outside experts by the ALJ appears at App. 78-80, 91, 103-109.

[9] A discussion of the school district's experts by the ALJ appears at App. 83-84, 103-109.

IEP in May of 1998, Brian's parents requested an administrative due process hearing. App. 25. Anticipating a protracted dispute, they also enrolled Brian for the 1998-99 school year at the McLean School, where they had previously reserved a space. McLean is a private school in Montgomery County that accommodates learning and language-disabled students in small classes. App. 25.

Because the school district did not offer Brian an appropriate education in the public schools, Brian's parents sought reimbursement from the school district for the tuition and expenses they paid to the McLean School.[10] App. 22. *See School Comm. of Burlington v. Dep't of Educ.,* 471 U.S. 359, 369 (1985) (holding that IDEA authorizes a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."). Brian's parents also pursued their claim in order to obtain a favorable decision that would enable their child to receive an appropriate education from the school district in the coming years.

**The ALJ's First Decision**

The administrative hearing lasted three days. As directed by the ALJ, each side filed briefs on the burden of proof. App. 57. Each side argued that the burden should be borne by the other. Each side also presented

[10] Although Brian graduated from high school in 2003 and is no longer eligible for IDEA services, this case nonetheless presents a continuing controversy because petitioners seek reimbursement for the costs they incurred in providing their son the appropriate education services that the school district refused to provide. These costs total thousands of dollars for eighth grade alone. *See Zobrest v. Catalina Foothills Sch. District*, 509 U.S. 1, 4 n.3. (1993) (holding that claim for reimbursement preserves case as live controversy despite student's graduation).

expert testimony supporting its position on the merits. The outside experts, Brian's parents and educators from Green Acres School explained that the school district's plan was deficient; the school district's witnesses disagreed. After weighing the conflicting evidence, the ALJ concluded that the outcome of the case depended on which side had the burden of proof:

> There are experts on both sides in this case who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of what the Child's needs were and which placement would afford the requisite educational benefit for the Child*, an assignment of the burden of proof in this case becomes critical*.

App. 144 (emphasis added).

The ALJ recognized that "[t]here is no clear authority" on who bears the burden of proof and that "[t]he case law provides support for assigning that burden to either party." App. 144. Outlining a split that has now grown much wider, the ALJ noted that some circuits place the burden of proof on the school district. *Id*. On the other hand, he explained, other circuits place the burden on the parents. App. 144-45. Confronted by the conflicting authorities, the ALJ elected the latter course and concluded that "the *Parents* bear the burden of persuasion." App. 146 (emphasis added). Thus, the petitioners were required to show that the IEP prepared by the school district did not offer Brian a FAPE. Having thus imposed the burden of proof on Brian's parents – and viewing the burden as "critical" to the outcome – the ALJ then concluded that the parents had failed to meet their burden. App. 156. Thus, he ruled for the school district on the merits of the case, approving the school district's plan for Brian and denying the parents' request for tuition reimbursement. App. 157.

**The District Court – First Decision**

Brian's parents appealed the ALJ's decision to the United States District Court for the District of Maryland.[11] There they prevailed. Reversing the ALJ on the burden of proof issue, the district court placed the burden on the school district and remanded the case back to the ALJ for further proceedings under the corrected standard. In so ruling, the district court relied heavily on an IDEA case decided by the New Jersey Supreme Court, *Lascari v. Board of Education of Ramapo Indian Hills Regional High School District,* 560 A.2d 1180, 1188 (N.J. 1989).[12]

*Lascari* is a seminal case explaining why the school district should *always* bear the burden of proof. Even so, on the facts before it, the district court found that it did not need to go so far as *Lascari*. Adhering to a middle course, the district court distinguished between two types of cases – those involving an *initial* IEP and those involving a proposed change to an *existing* IEP. With regard to an initial IEP, the district court ruled that *the school district* should have the burden of proof at the administrative hearing. However, where a party – either the parents or the school district – seeks to change an existing IEP, the burden at the due process hearing fairly lies with "the party seeking the change." App. 68. This distinction was later obliterated by the sweeping language of the Fourth

[11] *See* 20 U.S.C. § 1415(i)(2)(A) ("Any party aggrieved by the findings and decision . . . [of an ALJ], shall have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."). It is this statute that provided the basis of jurisdiction for the original action in district court.

[12] All but ignored by the two judges forming the Fourth Circuit majority, *Lascari* figures prominently in the split among lower courts. *See infra* at 25.

Circuit, which apparently places the burden on the parents in *all* cases when they challenge a proposed IEP. *See infra* at 14.

**The ALJ's Second Decision**

When the remanded case came back to the ALJ, no new evidence was presented. Thus, the "weight of the evidence" again "rest[ed] in equipoise." App. 105, 109. With the burden now shifted to the school district, the ALJ ruled for the parents, concluding that the IEP failed to provide Brian with meaningful educational benefit. App. 153. As the ALJ explained, "[Brian's] learning disability, his distractibility, and his auditory processing skills deficit dictate that he be in small classes for all his academic subjects; large classes are not appropriate for the Child." App. 91.[13] Thus, the ALJ concluded:

> [A]s a matter of law . . . [1] the April 6, 1998 IEP was not reasonably calculated to provide "significant learning" and "meaning[ful] educational benefit" and [2] the placement(s) offered by [the school district] were not appropriate and failed to afford the Child an opportunity for a FAPE for the 1998-1999 school year as required by [the] IDEA.

App. 115. Having ruled that the school district's plan was inadequate, the ALJ awarded the parents *half* of the tuition they expended to obtain an appropriate placement for Brian for the 1998-99 school year. App. 115. Neither

[13] The ALJ also determined that the "inclusion model" proposed by the school district actually would be counter-productive. App. 91. He also found that the school district's proposal fell short in other ways. For example, "[t]he IEP had no goals to address [Brian's] severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem." App. 91-92.

side found this decision satisfactory, and both appealed to the district court.[14] Meanwhile, other proceedings were underway in the court of appeals.

**The Court of Appeals – First Decision**

While the case was before the ALJ on remand, the school district was simultaneously appealing the district court's 2000 decision to the Fourth Circuit. Although not critical to the outcome, this stage of the litigation is significant because of the involvement of the United States. Filing an *amicus* brief in support of the parents, the United States argued that the burden should be placed on the school district.[15] To do otherwise, the United States said, would "unhinge [the] statutory framework" created by Congress. Brief for *Amicus Curiae* United States ("U.S. *Amicus* Brief") at 5, *Schaeffer v. Vance*, 2 Fed. Appx. 232 (4th Cir. 2001) (No. 00-1471). The government gave two overarching reasons for placing the burden of proof on the school district.

First, the United States concluded that such an approach furthers the IDEA's goal of providing a free appropriate public education to children with disabilities. U.S. *Amicus* Brief at 6. As the government explained:

- "[A]llocating the burden of proof to the parents would undermine the IDEA's provisions that ensure parents meaningful participation in developing the IEP."

[14] As in the first appeal to the district court, the basis for jurisdiction was 20 U.S.C. § 1415(i)(2)(A). *See* n.11, *supra*.

[15] The United States has not participated in later stages of the case.

- "[A]ssigning the burden of proof to the school is consistent with the IDEA's overall objective . . . by serving as an additional incentive for school officials to draft IEPs that provide FAPE to children with disabilities."
- "[B]ecause the IDEA contemplates that the school would take the lead in . . . proposing an appropriate educational plan, it is entirely consistent with the statutory scheme to also require that the school be able to prove at the due process administrative hearing that the proposed IEP will provide FAPE to a child with a disability."

*Id*. at 12.

Second, the United States noted that principles of fairness support allocating the burden to the party with greater access to necessary evidence. U.S. *Amicus* Brief at 14. As the government explained:

> [C]ourts have often allocated the burden of proof to the party other than the one challenging an agency action in order to accommodate statutory priorities or to protect certain interests, in accordance with the Supreme Court's general standard allowing burden shifting according to "policy and fairness based on experience."

*Id.* at 13-14 (quoting *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973)). Protecting those interests in the context of the IDEA means placing the burden of proof on the school district because "the school is in a better position to prove the appropriateness of its proposed IEP." U.S. *Amicus* Brief at 16.[16]

[16] The United States relied, in part, on Engel, *Culture, and Children with Disabilities*, 1991 Duke L. J. at 187-94 (arguing that parents are generally at a disadvantage vis-a-vis the school when

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By the time the court of appeals heard oral argument, the ALJ had already ruled in favor of the parents. Given this development, the court of appeals chose not to address the burden of proof until after the district court could hear an appeal from that ALJ ruling. Thus, the court of appeals vacated the district court's decision and remanded the case "with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration on the merits." App. 52.

**The District Court – Second Decision**

The case then came back before the district court, with the remand from the court of appeals linking up with cross-appeals from the ALJ's second decision. On cross-motions for summary judgment,[17] the district court again ruled that, because the case involved "the parent's disagreement with an initial IEP," the school district had the burden of proof. The court supported the conclusion with the same rationale found in its first decision. App. 32. Concluding that the school district "did not provide Brian with FAPE for 1998-99," the court awarded the parents

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disputes arise under IDEA because parents generally lack specialized training and because their views are often treated as "inherently suspect" due to the attachment to their child). U.S. *Amicus* Brief at 16.

[17] When an IDEA case is heard on appeal by a district court, the parties typically use cross-motions for summary judgment as the procedural mechanism to bring forward their competing claims for judgment based on the administrative record. This is so even when that record contains conflicting evidence. *See*, *e.g., Beth B. v. Van Clay,* 282 F.3d 493, 496 n.2 (7th Cir. 2002) ("Due to the unique procedural posture of these cases . . . summary judgment has been deemed appropriate even when facts are in dispute. . . ."); *L.B. v. Nebo Sch. Dist.,* 379 F.3d 966, 974 (10th Cir. 2004) (same); *Loren F. v. Atlanta Indep. Sch. Sys*., 349 F.3d 1309, 1313 (11th Cir. 2003) (same). Use of this procedure is not an issue in this case.

full reimbursement for the tuition they paid in the 1998-99 school year. App. 41, 47. The school district then appealed to the Fourth Circuit, challenging the allocation of the burden of proof.

**The Court of Appeals – the Decision at Issue**

On appeal, the Fourth Circuit noted that the circuits are deeply split on how to allocate the burden of proof in administrative hearings under the IDEA. According to the panel majority, "[t]hree circuits assign the burden to the parents, and four (perhaps five) assign it to the school system." App. 7. Siding with the minority view, the divided panel reversed the district court and held – without qualification – that "parents who challenge an IEP have the burden of proof in the administrative hearing." App. 16.

In reaching this result, the panel majority began by recognizing a general principle governing the allocation of burdens of proof. It said: "Although 'the *natural tendency* is to place the burden[ ] on the party desiring change' or seeking relief, *other factors* such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof." App. 6 (emphasis added) (quoting J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)). Despite the precedents and "other factors" urged by Brian's parents, the majority "[saw] no reason to depart from the general rule that a party initiating a proceeding bears [the] burden [of proof]." App. 15. Thus, it ruled for the school district and remanded the case back to the district court.

Judge Luttig dissented. Starting with the same general principle as the panel majority, he reached the diametrically opposite result. In his view, "[e]ach of these 'other factors' – policy, convenience and fairness – weigh against the assignment of the burden of proof to the

parents. . . ." App. 17. Agreeing with the district court, he concluded that "the school district – and not the comparatively uninformed parents of the disabled child – must bear the burden of proving that the disabled child has been provided with the statutorily required appropriate educational resources." App. 16.

Judge Luttig also criticized the majority for being "unduly influenced" by the knowledge and sophistication of Brian's parents. App. 20. He explained that, for the "vast majority" of parents with disabled children, the IEP proposed by the school district will be "resistant to challenge" and IDEA procedures "will likely be obscure if not bewildering." *Id*. Moreover, unlike many other civil rights statutes, the IDEA "imposes an *affirmative obligation* on the nation's school systems to provide disabled students with an enhanced level of attention and services." App. 18 (emphasis in original). Judge Luttig's recognition of this affirmative obligation dovetails with congressional finding that minority children with disabilities face special challenges. *See* 20 U.S.C. § 1415(c)(8)(A) ("[G]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities."). Thus, "[w]ith the full mix of parents in mind," and realistically assessing the opposing parties relative abilities to present evidence and prove their case, Judge Luttig dissented from the panel majority. App. 20. Aligning himself instead with the majority of circuits, he concluded that "the proper course is to assign the burden of proof in due process hearings to the school district." *Id*.

Following the panel decision, the court of appeals denied a petition for rehearing *en banc*. App. 164. Upon remand, the district court stayed further proceedings pending disposition of this petition. App. 163.

## REASONS WHY THE WRIT SHOULD BE GRANTED

**"[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."**

***Brown v. Board of Education*, 347 U.S. 483, 493 (1954).**

This case implicates the right of parents to obtain a free appropriate public education for their children with disabilities. It is a right once denied by many local school districts, but now firmly grounded in federal law – the IDEA. It is, however, a right that is meaningful only if parents are able to hold local school districts accountable at the administrative hearings that are made available under that law.

The ability of parents to hold school districts accountable is greatly affected by the answer courts have given to the question presented by this petition: which side has the burden of proof? Do the parents bear that burden? Or, is it more appropriate to place that burden on the school districts, which have the expertise to explain their decisions as well as an affirmative obligation to provide disabled children with education programs tailored to their individual needs?

It is a question that the IDEA does not explicitly address and on which the lower courts have given conflicting answers. The majority rule – adopted by six circuits and by the Supreme Court of New Jersey – is that the burden is rightfully placed on the school district. The minority rule – now adopted by four circuits – places the burden of proof on the parents. It is a question that this Court should now address.

There are three reasons why this petition should be granted. First, the lower courts are deeply divided on an

issue of federal law. This fact alone makes this petition a worthy candidate for certiorari. Sup. Ct. Rule 10(a). Second, the issue is an important one, implicating the civil rights of those parents and children who depend upon the IDEA to obtain real educational opportunity. More than 3,000 administrative hearings are held under the IDEA each year. Many more are requested but ultimately cancelled when parents assess the difficulty of the process. And still many more children are affected by the parties' awareness of who will bear the burden of proof if negotiations fail. Third, this petition presents an ideal vehicle for resolving the issue. The split is mature. The case is not cluttered by collateral issues. The decision below – with its majority opinion and its dissent by Judge Luttig – neatly frames the issue for resolution by this Court.

## I. THE DECISION BELOW EXACERBATES A MAJOR SPLIT AMONG THE CIRCUITS.

Ten circuits have addressed the question presented by this petition. Four circuits – now including the Fourth Circuit – have ruled that the burden of proof rests on the disabled child's parents. Six circuits have ruled that the burden rests on the school district. Additionally, in a decision distinguished by its depth of analysis, the New Jersey Supreme Court has placed the burden of proof on the school district. This is a deep split that should be resolved by this Court.

### Courts Placing the Burden on Parents –

Before adding its own decision to the list, the Fourth Circuit recognized that three circuits place the burden of

proof on the parents in administrative hearings under the IDEA.[18] These circuits are the Fifth, Sixth and Tenth.

**Fifth Circuit** – The first decision by the court of appeals addressing the burden of proof was *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part and rev'd in part sub nom., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).[19] There the Fifth Circuit actually placed the burden on the *school district* because it was the party seeking to change a previously agreed-upon IEP. As the court explained:

> [B]ecause the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate. Since the school district has not even attempted to do so, its argument must be rejected. . . .

*Tatro*, 703 F.2d at 830. In other words, *Tatro* treated the IEP as presumptively correct because it represented a bilateral agreement.

Three years later, the Fifth Circuit decided *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153 (5th Cir. 1986). Like *Tatro*, the

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[18] The federal law now known as the IDEA has been known by other names since it was first adopted in 1975, including the Education of the Handicapped Act (EHA) and the Education of All Handicapped Children Act (EAHCA). For the sake of consistency, this petition refers to the federal law as "the IDEA," even when the cited case uses one of the law's former names. This approach mirrors the one followed implicitly by the decision below and followed by other circuits as well. *See, e.g., Covington v. Knox County Sch. Sys*., 205 F.3d 912, 915 n.2 (6th Cir. 2000) (explicitly adopting this approach to statutory nomenclature).

[19] The burden of proof was not an issue addressed by this Court when it ruled in the *Tatro* case.

*Alamo Heights* case involved an attempt to modify an existing IEP; however, this time it was the parents who sought the change, and it was the parents who bore the burden. The Fifth Circuit declared:

> [T]he Act creates a "presumption in favor of the education placement established by [a child's] IEP," and "the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate."

*Id.* at 1158 (quoting *Tatro*, 703 F.2d at 830) (second brackets added by Fifth Circuit). Although the Fifth Circuit explained its decision by quoting from *Tatro*, it failed to recognize that a major change was afoot. In *Alamo Heights*, the rationale for treating an IEP as presumptively correct was fundamentally altered. Where *Tatro* relied on the fact that the IEP was "jointly developed by the school district and the parents," *Alamo Heights* relied on what it called "the expertise of local education authorities." 790 F.2d at 1158. In other words, under *Alamo Height*s, an IEP must be treated as presumptively appropriate simply because the school district *says* it is appropriate. Bilateralism has been replaced by unilateralism. As a result, the Fifth Circuit is now among those circuits that always impose the burden of proof on parents.

**Sixth Circuit** – The burden of proof was first addressed by the Sixth Circuit in a pair of 1990 cases: *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990), and *Doe v. Defendant I,* 898 F.2d 1186 (6th Cir. 1990). Standing by themselves, these cases appear to say that the burden should be placed on whichever party – the parents or the school district – seeks to change a previously agreed-upon

IEP.[20] However, the Sixth Circuit later relied on these decisions to impose the burden on parents even where there was no previously existing IEP. According to the court, "[the child] and his parents bear the burden of proving by a preponderance of the evidence that the IEP devised by the Board is inappropriate." *Doe v. Bd. of Educ. of Tullahoma City*, 9 F.3d 455, 458 (6th Cir. 1993) (citing *Cordrey*, 917 F.2d at 1469; *Doe*, 898 F.2d at 1191) (emphasis added). Thus, while the rationale for its position is unclear,[21] the Sixth Circuit is plainly among those circuits that place the burden of proof on the parents.

**Tenth Circuit** – In *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990), the Tenth Circuit said that "the burden of proof in these [IDEA] matters rests with the party attacking the child's individual education plan." *Id.* at 1026. In explaining the reason for its position, the Tenth Circuit did no more than quote from the Fifth Circuit's opinion in *Alamo Heights*, not recognizing that *Alamo Heights* distorted the rationale previously used by the Fifth Circuit in *Tatro*. *See supra* at

[20] *See, e.g.*, *Cordrey*, 917 F.2d at 1469 ("Under this rule, [the child] and his parents would bear the burden of proof since they seek to add [extended school year] services to his IEP."); *Doe,* 898 F.2d at 1191 ("because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate") (quoting *Tatro,* 703 F.2d at 830).

[21] The decision below suggests that the Sixth Circuit imposes the burden on parents with respect to "both . . . procedural and substantive deficiencies" because that is the "traditional burden of proof." App. 7 (quoting *Cordrey*, 917 F.2d at 1466). However, a close reading of the cited passage shows that the "traditional" comment applies *only* to procedural compliance – not substantive compliance. Thus, the rationale for the Sixth Circuit's position on the burden of proof for substantive deficiencies remains elusive, and the Fourth Circuit's reliance on that position remains unpersuasive.

19. While thus adding to the number of circuits embracing the minority position, *Johnson* adds nothing to the persuasiveness of that position.[22]

**Courts Placing the Burden on the School District –**

The Fourth Circuit said that four – "perhaps five" – circuits place the burden of proof on the school district. App. 7. These circuits include the Second, Third, Eighth, Ninth and District of Columbia Circuits. Not mentioned by the Fourth Circuit is the Seventh Circuit, which has also said that the school district bears the burden of proof. Noted but not discussed by the Fourth Circuit is the decision by the New Jersey Supreme Court in *Lascari*, which also places the burden of proof on the school district. App. 9. Each of these seven jurisdictions will be discussed in turn.

**Second Circuit** – In *Walczak v. Florida Union Free School District,* 142 F.3d 119 (2d Cir. 1998), the court placed the burden of proof on the school district. As it explained:

> Parents who are dissatisfied with a proposed IEP may file a complaint with the state educational agency. . . . Complaints are resolved through an

[22] In a later case, the Tenth Circuit left open the possibility that the school district might bear the burden of proof where it is the party seeking to change a *previously agreed-upon* IEP. *See Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 930 (10th Cir. 1995) (noting that, given its disposition of the case, the court "need not decide" whether "the District bore the burden of proving that [an agreed upon placement] had become inappropriate for [the child] and that a change . . . was therefore necessary"). While this aspect of the burden of proof is not implicated by the facts of Brian's case, the Tenth Circuit's reservation on this point underscores the inappropriateness of the sweeping language used by the court of appeals in establishing a rule for the Fourth Circuit.

> "impartial due process hearing" . . . at which *school authorities have the burden* of supporting the proposed IEP. . . .

*Id.* at 122 (emphasis added). In imposing the burden on the school district, the Second Circuit relied on a series of administrative decisions including *Matter of the Application of a Handicapped Child*, 22 Educ. Dep't Rep. 487, 489 (1983) ("It is well established that a board of education has the burden of establishing the appropriateness of the placement recommended by [the school board]"). The Second Circuit continues to adhere to *Walczak*.[23]

**Third Circuit** – A leading case for placing the burden of proof on the school district is *Oberti v. Board of Education,* 995 F.2d 1204 (3d Cir. 1993). Analyzing the competing interests in some detail, the court explained:

> In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents.

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[23] *See*, *e.g., Grim v. Rhinebeck Cent. Sch. District*, 346 F.3d 377, 379 (2d Cir. 2003) ("[T]he school district has the burden of demonstrating the appropriateness of its proposed IEP."); *Sherman v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87, 93 (2d Cir. 2003) ("The School District bears the burden of proving that it has met [the IDEA] requirement" that "an IEP be 'reasonably calculated' to confer 'educational benefits.'"); *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96, 102 (2d Cir. 2000) ("The School Board shoulders the burden of proof" on "whether the IEP was 'reasonably calculated' to confer 'educational benefits.' "); *M.C. v. Voluntown Bd. of Educ*, 226 F.3d 60, 63 (2d Cir. 2000) ("Any such complaint is resolved through an 'impartial due process hearing' . . . at which school authorities have the burden of supporting the proposed IEP.").

*Id.* at 1219. The court then went on to endorse the view that placing the burden of proof on the school is "consistent with the proposition that the burdens of persuasion and production should be placed on the party better able to meet those burdens." *Id.* (quoting *Lascari*, 560 A.2d at 1188).

The precise question addressed in *Oberti* was which side has the burden of proof in an appeal to the district court; however, the principles on which the Third Circuit decided that question are broad enough to govern the administrative hearing as well. Indeed, the Third Circuit has relied upon *Oberti* for the principle that "[i]n *administrative* and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed." *Carlisle Area Sch. Dist. v. Scott P.,* 62 F.3d 520, 533 (3d Cir. 1995) (emphasis added) (citing *Oberti,* 995 F.2d at 1219).

**Seventh Circuit** – The Fourth Circuit did not list the Seventh Circuit as one of the courts that has addressed the burden of proof issue; however, the Seventh Circuit has made it clear – albeit in *dictum* – that it regards the burden as properly placed on the school district. *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002) ("The hearing officer correctly applied the burden of proof and found that the district satisfactorily showed that its proposed IEP was adequate under the IDEA.").

**Eighth Circuit** – In *E.S. v. Independent School District No. 196,* 135 F.3d 566, 569 (8th Cir. 1998), the court held that "[a]t the administrative level, the [School] District clearly had the burden of proving that it had complied with the IDEA." *Id*. at 569 (citing *Clyde K. v. Puyallup Sch. Dist. No. 3,* 35 F.3d 1396, 1398-99 (9th Cir. 1994)).

The decision in *E.S.* was followed the next year by *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999), which also placed the burden on the school district: "At [the student's] administrative due process hearing the School District had the burden of proving that its proposed IEP would satisfy the requirements of the IDEA and provide [the child] with a free appropriate public education." *Id*. at 658 (citing *E.S.*, 135 F.3d at 569). Moreover, when asked to rehear the *Blackmon* case *en banc*, the Eighth Circuit declined to do so. 2000 U.S. App. LEXIS 965 (8th Cir. Jan. 25, 2000) (Nos. 99-1163/99-1288). Thus, it remains the law of the Eighth Circuit that the school district has the burden of proof.

**Ninth Circuit** – In *Clyde K. v. Puyallup School District No. 3,* 35 F.3d 1396, 1398 (9th Cir. 1994), the court entertained no doubts about where the burden of proof should be placed at a due process hearing, stating that "[t]he school clearly had the burden of proving at the administrative hearing that it complied with the IDEA." The Ninth Circuit continues to adhere to the *Clyde K.* decision that the school district has the burden of proof.

**D.C. Circuit** – In reviewing the split in the circuits, the court below was unsure how to treat the D.C. Circuit. Quoting *McKenzie v. Smith,* 771 F.2d 1527, 1532 (D.C. Cir. 1985), the Fourth Circuit said:

> [T]he D.C. Circuit assigned the burden of proof to a school system when an IEP was challenged as *procedurally deficient*, noting that "the underlying assumption of the Act is that to the extent its procedural mechanisms are faithfully employed, [disabled] children will be afforded an appropriate education. . . . " It is not clear how the D.C. Circuit would assign the burden in a case such as this one where only the *substance* of the IEP is challenged.

App. 8 (emphasis added) (second brackets added by Fourth Circuit). There is, however, no uncertainty. The Board of Education for the District of Columbia has, *by regulation*, recognized its obligation to bear the burden of proof. The regulation provides that, in a due process hearing, "[t]he LEA [local education agency] shall bear the burden of proof, based solely upon the evidence and testimony presented at the hearing, that the action or proposed placement is adequate to meet the educational needs of the student." D.C. Mun. Regs. tit. 5, § 3030.3 (2004).[24] Arguably, this regulatory resolution of the issue removes the District of Columbia from the score card on how the circuits are aligned. However, the fact that the District of Columbia applies the IDEA in a manner contrary to its own institutional interests reinforces the doubts about the way in which the Fourth Circuit has construed that statute.

**New Jersey** – The decision below not only conflicts with the decisions of six other circuits, it also conflicts with the decision of the New Jersey Supreme Court in *Lascari v. Board of Education of Ramapo Indian Hills Regional High School District,* 560 A.2d 1180, 1188 (N.J. 1989). Echoed below in Judge Luttig's dissent, *Lascari* also provided much of the analysis upon which the district court relied in placing the burden on the school district. *See* App. 36-37.

In reaching its conclusion, *Lascari* discussed the federal policy at stake: "Through [the IDEA], Congress sought to ensure that school districts would be held accountable for the proper education of handicapped

[24] *See Scorah v. District of Columbia*, 322 F. Supp. 2d 12 (D.D.C. 2004) (applying a predecessor regulation placing burden of proof on the D.C. public school system).

children, *a task the districts had previously ignored*." *Lascari*, 560 A.2d at 1183 (emphasis added) (citing S. Rep. No. 94-168, 94th Cong., 2d Cong. Sess. 25-27, *reprinted in* 1975 *U.S. Code Cong. & Admin. News* (89 Stat.) 1449-50; *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982)). Given this background of neglect, placing the burden on the school district is "more consistent" with the IDEA and "protects the rights of handicapped children to an appropriate education." *Lascari*, 560 A.2d at 1188. Anticipating the views later expressed by the Third Circuit in *Oberti* and by the United States in its 2000 *amicus* brief, the *Lascari* court also supported its conclusion with practical considerations:

> Our result is also consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens.
>
> * * *
>
> The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP.
>
> * * *
>
> By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.

*Id.* Thus, the court concluded that "the obligation of parents at the due process hearing should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate." *Id*.

In sum, the split is not only wide, it is also deep, pitting the rationale of *Lascari* and Judge Luttig against the rationale advanced by the panel majority. It is a split this court should now resolve.

## II. ALLOCATING THE BURDEN OF PROOF IN IDEA CASES IS AN IMPORTANT ISSUE THAT THIS COURT SHOULD DECIDE.

Aptly described by the United States as "an important civil rights statute," U.S. *Amicus* Brief at 1, the IDEA is the principal vehicle by which educational benefits are provided to children with disabilities. It is, therefore, especially inappropriate for the law to be applied in the patchwork fashion created by the conflicting decisions on the burden of proof. Simply put, children and parents in some States have fewer or less effectual rights than their counterparts in other States, even though all were intended to be beneficiaries of the same national law. This Court should resolve the conflict.

The need for certiorari is underscored by the large number – and broad range – of disabled students served by the IDEA. The U.S. General Accounting Office ("GAO") recently noted that, nationwide, about 6.5 million children and young adults – aged 3 through 21 – receive special education services under the IDEA. GAO, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate (Sept. 2003) ("GAO Report") at 1. These 6.5 million students are "about 13 percent" of the total number of students nationwide, and they include "a wide variety of needs that range from mild to severe." *Id*. at 5. As the GAO explained:

> Children with speech or language impairments, specific learning disabilities, emotional disturbance, hearing impairments (including deafness), visual impairments (including blindness), orthopedic impairments, autism, traumatic brain injury, other health impairments, or mental retardation, and who need special education and related services are eligible under [the] IDEA.

*Id.*

The GAO also reported that, "[w]hile national data on disputes are limited and inexact," more than *3,000* due process hearings are held each year. *Id.* at 1. Equally important is this comment from the U.S. Department of Education about the significance of a hearing:

> Due process hearings are expensive for all parties, time-consuming, and are not undertaken lightly, so *due process hearings are universally understood to be a marker of serious unresolved differences* about a student's need for special education and related services or the nature or location of services.

*Id.* at 29 (reproducing letter from Assistant Secretary of Education, R.H. Pasternack, Ph.D.) (emphasis added). Consistent with this observation about costs – and consistent with Judge Luttig's concern for the "vast majority of parents" – the GAO reports a "significant relationship" between household income and hearing requests. GAO Report at 15 n.22. Not surprisingly, households with lower income are less likely than households with higher income to request a due process hearing. *Id*. Indeed, it is these less privileged families who figure most prominently among the "full mix of parents" whose difficulties in coping with IDEA procedures led Judge Luttig to conclude that the burden of proof should be placed on the school district. App. 20. Imposing the burden on parents adds yet another obstacle to these families seeking to vindicate their rights under the law.

It is, however, not just those who actually participate in hearings who are affected by the burden of proof. Many more hearings are requested than are actually held. *See* GAO Report at 13 (noting that 11,068 hearings were requested in 2000, but only 3,020 were held). Such a discrepancy suggests that many parents find the process too daunting and simply capitulate. The difficulties parents

encounter will be either exacerbated or ameliorated by the decision on where to place the burden. Indeed, the burden of proof can effect the outcome much earlier in the process. When parents and the school district sit down to negotiate the education program for a child, an awareness of who will bear the burden if no agreement can be reached can significantly affect the negotiation dynamics. Placing the burden on the parents significantly strengthens the hand of often-intransigent school district bureaucracies.

There is a manifest need for a uniform national rule on the burden of proof. Moreover, the rather extreme standard adopted by the Fourth Circuit – placing the burden on the parents *whenever* they challenge the school district – makes it especially appropriate that such a rule be established here. As a result of the decision below, school districts in five States will now be free to "ratchet down" services from previously-agreed levels, thereby confronting families with a dilemma: muster the costly resources necessary to mount a challenge or risk repeated cutbacks each year. Meanwhile, in two bordering circuits – the Third and the District of Columbia – the school district bears the burden, thereby creating an incentive for some families to relocate to obtain the services they need. A uniform rule is needed. Certiorari should be granted.

## III. THIS PETITION PRESENTS AN IDEAL VEHICLE FOR DECIDING HOW TO ALLOCATE THE BURDEN OF PROOF.

Not only is the burden of proof an issue that should be resolved, this petition presents an ideal vehicle for resolving it. This is so for several reasons:

1. This petition comes at a time when the split is mature. Ten circuits have addressed the issue, and nothing would be gained by allowing it to percolate longer.

2. The case is not cluttered by collateral issues that could distract from the question presented or hinder its resolution. The burden of proof is the only issue addressed by the decision below.

3. By placing the burden of proof on the parents in all cases, the decision below stands in stark contrast with *Lascari*, which placed the burden on the school district in all cases. These "jurisprudential bookends" among the lower court decisions nicely highlight the issue for resolution by this Court.

4. Finally, unlike several circuit decisions – on both sides of the issue – the decision of the Fourth Circuit does not merely announce a result. It provides an explanation for its position. Moreover, it provides a well-reasoned dissent. Both the majority and dissenting opinions should assist the Court in reaching a careful resolution of the issue. For all of these reasons, certiorari should be granted.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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